No. 80-242

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In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN F. LEHMAN, SECRETARY OF THE NAVY, PETITIONER

v.

ALICE NAKSHIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent concedes (Br. 14-15) that the Seventh Amendment right to trial by jury in suits at common law does not extend to suits against the United States. Accordingly, she acknowledges that there is no right of trial by jury in actions against the federal government unless "Congress, in the legislation cited, has made it applicable" (*id.* at 17, quoting *Galloway* v. *United States*, 319 U.S. 372, 389 (1943)). Rule 38 of the Federal Rules of Civil Procedure states the same principle: where the Seventh Amendment does not apply, the right to trial by jury is preserved to the parties only "as given by a statute of the United States." The specific question presented, then, is whether Congress affirmatively granted the right to trial by jury in actions against the federal government under Section 15 of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a. Respondent's extended introductory discussion of jury trials generally

(Br. 14-39)—in cases brought *by* the United States as well as against it (albeit under other statutes), and in cases in which the federal government is not even a party—does not focus on this question. We therefore shall first address arguments that specifically relate to the ADEA.

Section 15 of the ADEA makes no reference to jury trials. This omission is in marked contrast to the express grant of the jury trial right in Section 7(c)(2) of the Act, 29 U.S.C. (Supp. III) 626(c)(2), in civil actions against private employers and state and local governments. As we argue in our opening brief (Govt. Br. 17), because Congress demonstrated in the very "legislation cited" (*Galloway* v. *United States*, *supra*, 319 U.S. at 388) that it knew how to grant a right to trial by jury when it so desired, and yet declined to do so in Section 15 for suits against the federal government, "traditional principles of statutory construction * * * compel[] the conclusion" that suits under Section 15 are not to be tried to a jury. *Fedorenko* v. *United States*, No. 79-5602 (Jan. 21, 1981), slip op. 20-21. And, as we have explained (Govt. Br. 11-14, 29), this conclusion conforms to Congress' usual practice of declining to provide for trial by jury when it waives the United States' sovereign immunity to suit, even though jury trials may be available in comparable lawsuits against private parties.

2. Respondent nonetheless argues (Br. 50-70) that Congress intended that procedures in suits under Section 15 of the ADEA would generally be the same as those followed under Section 7 and that a right to trial by jury therefore should be recognized in suits against the federal government under Section 15 even though Congress did not expressly so provide. She points out (Br. 54, 64-65) that when Congress enacted the ADEA in 1967 to prohibit age discrimination in private employment, it provided in Section 7(b) of the ADEA, 29 U.S.C. 626(b), that this prohibition would be enforced in accordance with the "powers, remedies, and procedures"

provided in certain sections of the Fair Labor Standards Act of 1938 (FLSA). In *Lorillard* v. *Pons*, 434 U.S. 575 (1978), the Court held that Congress could be presumed to have been aware that a right to trial by jury had been recognized in actions brought against private employers under Section 16(b) of the FLSA, 29 U.S.C. 216(b), to recover unpaid minimum wages or overtime compensation. Based on this presumption, the Court inferred that when Congress incorporated FLSA enforcement "powers, remedies, and procedures" in Section 7 of the ADEA, Congress intended that a jury trial would also be available in suits under Section 7 of the ADEA. 434 U.S. at 580-583. Based on her premise that Congress patterned suits under Section 15 of the ADEA after those under Section 7, respondent asks the Court to add to the inference drawn in *Lorillard* the further inference that Congress intended that jury trials would be available against the federal government. See also briefs of amici Members of Congress (at 15-17, 24-25) and AFGE (at 15-19). This argument fails for two reasons.

First, as we pointed out in our opening brief (Govt. Br. 36 n.29), the decisions cited by the Court in *Lorillard* (434 U.S. at 580 n.7) for the proposition that a right to trial by jury had been recognized in suits against private employers under the FLSA all appear to have rested on the Seventh Amendment, not on a conclusion that the FLSA itself grants such a right. Because the Seventh Amendment does not apply in suits against the federal government, there would be no comparable right to trial by jury in FLSA suits against the federal government under 29 U.S.C. 216(b). Therefore, even if Congress intended to incorporate the FLSA enforcement scheme into Section 15 of the ADEA, there would be no basis for inferring a right to jury trial.[1] Second, as we explained

[1] 29 U.S.C. 216(b) provides that an employer "shall be liable" for the amount of unpaid minimum wages or overtime compensation and authorizes an employee to bring an action to "recover such liability * * * in any Federal or State court of competent juris-

in our opening brief (Govt. Br. 20-26), Congress *rejected* the FLSA model when it enacted a separate section applicable only to federal employment and instead patterned Section 15 of the ADEA after Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16,[2] under which there is no right to trial by jury even in suits against private employers.

Because age discrimination in federal employment is covered by a separate section of the Act, the federal government is excluded from the definition of the term

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diction." Thus, a suit under the FLSA by a federal employee would appear to be a suit for "actual, presently due money damages" (*United States* v. *King*, 395 U.S. 1, 3 (1969)), for which the "court of competent jurisdiction" is the Court of Claims (28 U.S.C. 1491) or, if the amount in controversy does not exceed $10,000, a federal district court (28 U.S.C. 1346(a)(2)). Jury trials clearly are not available in suits under the Tucker Act in either forum. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962) (Harlan, J.); *McElrath* v. *United States*, 102 U.S. 426, 440 (1880); 28 U.S.C. 2402. If federal sector FLSA cases must be brought under the Tucker Act, this would furnish an additional reason for not inferring a right to trial by jury in suits against the federal government under the ADEA—even assuming, contrary to our submission above, that Congress intended to follow the FLSA model when it enacted Section 15 of the ADEA.

[2] Section 15 of the ADEA is not, of course, a verbatim replication of Section 717 of the Civil Rights Act of 1964. Respondent notes (Br. 50-52), for example, that a federal employee can bypass the EEOC administrative process under the ADEA simply by filing a notice of intent to sue with the EEOC pursuant to Section 15(d) and waiting 30 days; he cannot do so under Title VII. And amicus AFGE observes (Br. 6-7) that Section 15(c) of the ADEA provides for the award of "legal or equitable relief," but Section 717(c) of the Civil Rights Act of 1964 does not. However, neither of these differences between the two sections undercuts our submission that Congress *rejected* the FLSA model, which was the principal source of the jury trial right recognized in *Lorillard*. Respondent's point has no bearing whatever on the jury trial issue. And the distinction noted by AFGE is merely another way of saying that the presence of the word "legal" in Section 15(c) of the ADEA is indicative of an intent to grant a right to trial by jury. That argument is without merit, as explained in our opening brief (Govt. Br. 35-41).

Beebe v. United States, No. 326-79C (Ct. Cl. Jan. 28, 1981), slip op. 8.

"employer" in Section 11(b) of the ADEA, 29 U.S.C. 630(b), as that term is used elsewhere in the Act. The federal government therefore continues to be excluded from the coverage of the substantive prohibitions and exemptions in Section 4 of the ADEA, 29 U.S.C. 623, that apply to "employers." And because the federal government is not an "employer" for purposes of Section 4, it also is not subject to the provision in Section 7(b) of the Act that deems a violation of Section 4 to be a violation of the FLSA. Hence, the requirement in Section 7(b) that enforcement efforts be carried out in accordance with the "powers, remedies, and procedures" under the FLSA simply does not apply to discrimination in federal employment. By the same token, Section 15 itself does not deem violations of that section by the federal government to be violations of the FLSA, does not refer to the enforcement sections of the FLSA (29 U.S.C. 216 and 217), and does not incorporate FLSA "powers, remedies, and procedures." [3]

For the foregoing reasons, respondent's assertion that FLSA procedures, including recognition of a right to

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[3] It is therefore significant that when Congress amended Section 7(c) in 1978 expressly to provide for jury trials in suits brought under that section, it made such trials available in any action "for recovery of amounts owing as a result of a violation * * *." Under Section 7(b), such "amounts owing" as a result of a violation are deemed unpaid minimum wages and overtime compensation subject to recovery under the FLSA. Moreover, the discussion on the jury trial issue in the Conference Report on the 1978 amendments makes clear that the jury trial right is available to recover the "amounts owing" that are deemed to be liable under the FLSA. See H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 13-14 (1978). Thus, contrary to the contention of respondent (Br. 68-70), amici Members of Congress (Br. 8-10, 18-22, 27-30), and the court below (Pet. App. 13a-14a), it seems clear from these references to "amounts owing" and the FLSA in the text and legislative history of the 1978 jury trial amendment to Section 7 that the rationale and intent of that amendment do not extend to actions against the federal government under Section 15, which does not refer to "amounts owing" or incorporate FLSA remedies or procedures.

jury trial, apply in actions against the federal government under Section 15 is wholly without merit. And because the incorporation of FLSA "procedures" and enforcement provisions in Section 7 of the ADEA was the principal basis for the Court's decision in *Lorillard* finding a right to jury trial in an action brought against a private employer under that section (434 U.S. at 580-583),[4] the reliance on the FLSA and *Lorillard* by respondent (Br. 45, 64-65) and amici Members of Congress (Br. 6-7) and AFGE (Br. 2, 5-7, 22) is misplaced.[5]

3. Amicus AFGE argues (Br. 9-12), however, that Congress enacted a separate section of the ADEA solely in order to vest enforcement responsibility with the Civil Service Commission (CSC). AFGE points out that the CSC, rather than the EEOC, had previously been given responsibility for enforcing Title VII in the federal sector (42 U.S.C. 2000e-16(b)) and that the CSC, rather than the Secretary of Labor, was charged in the FLSA amendments of 1974 with administering the FLSA with respect to federal employment (29 U.S.C. 204(f)). Thus, the argument goes, the enactment of a new Section 15 is indicative only of an intent to utilize an existing administrative enforcement scheme and therefore sheds no light on the jury trial question. This contention is incorrect.

a. Although Congress did authorize the CSC to administer the FLSA with respect to federal employees,

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[4] The other factor cited by the Court—that Sections 7(b) and (c) refer to "legal" as well as "equitable" relief—served only to "buttress[]" the inference drawn primarily from the incorporation of FLSA procedures. 434 U.S. at 583.

[5] The Court held in *Lorillard* (434 U.S. at 580-581) that Congress could be presumed to have been aware that 29 U.S.C. 216(b) had been interpreted in a manner that permitted jury trials in suits brought under that section. Thus, the only inference pertinent to the instant case that could properly be drawn from Congress' *failure* to incorporate 29 U.S.C. 216(b) and the rest of the FLSA enforcement scheme into Section 15 of the ADEA is that jury trials are *not* available in ADEA suits against the federal government.

Congress did not adopt separate substantive provisions applicable only to federal employees, as it did in Section 15(a) of the ADEA. Moreover, 29 U.S.C. 204(f), which confers FLSA administrative authority on the CSC, expressly states that nothing in that subsection "shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under [29 U.S.C. 216(b)]." Despite the separate administrative scheme, then, federal employees were authorized to bring a judicial action under 29 U.S.C. 216(b) to recover their employer's liability for unpaid minimum wages or overtime compensation in the same manner as employees in the private sector. In contrast, when Congress enacted a separate Section 15 prohibiting age discrimination in the federal sector and vested enforcement authority in the CSC, it did not provide that federal employees could bring a civil action under Section 7(b) of the ADEA or 29 U.S.C. 216(b) in the same manner as employees in the private sector. Since 29 U.S.C. 204(f) and Section 15 of the ADEA were both enacted as part of the FLSA amendments of 1974, Congress' failure to include in Section 15 a reference to 29 U.S.C. 216(b) or to the private sector enforcement scheme in Section 7 of the ADEA must be regarded as deliberate. Hence, the manner in which Congress drafted Section 15 demonstrates that it intended to accomplish more than merely to assign administrative enforcement responsibility to the CSC.

b. A comparison of Section 15 of the ADEA with Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, compels the same conclusion. Subsection (a) of each section states the substantive prohibition against discrimination in federal employment, and Subsection (b) of each vests enforcement responsibility with the CSC (now the EEOC). Subsection (c) of each then authorizes the person aggrieved to bring a civil action. But there is a critical difference between the two Acts in this regard.

Section 717(c) of the Civil Rights Act provides that the person aggrieved may bring a civil action "as provided in Section 706" of the Act, which establishes the procedure for employees in the private sector and state and local government to sue under Title VII. Section 717(d) also provides that Subsections (f) through (k) of Section 706, as applicable, "shall govern civil actions brought" under Section 717. Relying on these cross-references to Section 706 and explicit statements in the legislative history of the 1972 amendments to Title VII that federal and private employees should be treated alike in pertinent procedural matters, the Court concluded in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), that a federal employee has the same right as a private employee to a trial de novo under Title VII.

Section 15 of the ADEA was patterned after Section 717 of the Civil Rights Act of 1964 and was first offered by its sponsor, Senator Bentsen, shortly after the 1972 amendments to Title VII were enacted (Govt. Br. 23-24). Therefore, the only inference that can be drawn from Congress' failure to include a reference in Section 15 of the ADEA to the parallel civil action provisions for employees in the private sector, as it did in the Title VII provisions relied upon by the Court in *Chandler* v. *Roudebush*, is that Congress did *not* intend that the procedural rights of federal and private employees under the ADEA would be the same.[6]

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[6] The courts of appeals have uniformly held that because Title VII makes no express provision for payment of interest on back pay awards, the doctrine of sovereign immunity bars such a payment in an action against the federal government, even though interest on back pay awards may be available to private employees under Title VII. *Claytor* v. *Saunders*, 629 F.2d 596 (9th Cir. 1980), cert denied, No. 80-995 (Mar. 9, 1981); *Blake* v. *Califano*, 626 F.2d 891 (D.C. Cir. 1980); *deWeever* v. *United States*, 618 F.2d 685 (10th Cir. 1980); *Fischer* v. *Adams*, 572 F.2d 406, 411 (1st Cir. 1978); *Richerson* v. *Jones*, 551 F.2d 918, 925 (3d Cir. 1977). As we explained in our opening brief (Govt. Br. 10-16), the doctrine of sovereign immunity is also relevant to the availability of jury trials in suits against the government: It is the federal govern-

4. The separate nature of Section 15 that is evident from the circumstances of its original enactment was made even more apparent by the addition in 1978 of a new Subsection (f) to that section. 29 U.S.C. (Supp. III) 633a(f). Subsection (f) provides that "[a]ny personnel action of any [federal] department, agency or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act, other than the provisions of section 12(b) of this Act and the provisions of this section." On its face, Subsection (f) would appear to require that federal personnel actions not be "affected by" or "subject to" Sections 7(b) and (c), which contain the procedural provisions incorporated from the FLSA and the express grant of a right to trial by jury in private sector cases.

Respondent argues (Br. 57-63), however, that Section 15(f) does not bar the application of procedures and remedies available in private sector ADEA cases to suits against the federal government under Section 15(c); rather, she contends, its purpose is to bar the application to federal employment of certain *substantive* provisions to which private employers are subject. A similar argument is advanced by amici Members of Congress (Br. 22-27) and AFGE (Br. 12-19). The AFGE, for example,

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ment's immunity from suit that renders the Seventh Amendment inapplicable and therefore requires an affirmative grant of the jury trial right in such cases, even though a jury trial may be available against a private party as a matter of constitutional right or statutory inference (cf. *Lorillard* v. *Pons*, *supra*, 434 U.S. at 577). The appellate cases just cited hold that the federal government stands on a different footing under Title VII on matters to which sovereignty is relevant despite the affirmative evidence of congressional intent that federal and private employees generally have the same procedural rights. Because of the absence of such evidence in the ADEA, it follows, a fortiori, that the federal government stands on a different footing under Section 15 for those purposes for which the government is traditionally treated differently because of its sovereign status, such as the availability of jury trials.

points (Br. 13 n.8) to the statement in the House Report on the 1978 amendments to the ADEA that Section 15 "is complete in itself" and that "[r]estrictions and limitations in other parts of the act, such as paragraph (a) of section 12 [which provides an upper age limit of 70 for protection of non-federal employees] and paragraph (f) of section 4 [which allows employers to establish bona fide occupational qualifications and to observe the terms of a bona fide seniority or other benefit plan] do not apply to section 15." H.R. Rep. No. 95-527 (Pt. I), 95th Cong., 1st Sess. 11 (1977). However, it does not appear that the new Subsection (f) of Section 15 was necessary in order to prevent application of these and other substantive provisions of the Act to the federal sector. Subsection (b) of Section 12, 29 U.S.C. (Supp. III) 631(b), separately addresses the issue of an upper age limit in federal employment by removing it altogether. In view of this provision, it seems most unlikely that the upper age limit of 70 in Subsection (a), which was clearly intended to apply only in the non-federal sector, would have been imported into the federal sector if Section 15(f) had not been enacted. In addition, it is evident from the face of the Act that the exceptions in Section 4(f) for bona fide occupational qualifications and seniority and other benefit plans could not have applied to the federal government. These defenses are available only to an "employer, employment agency, or labor organization"; the United States is expressly excluded from the definitions of the terms "employer" and "employment agency" in Sections 11(b) and (c), and the federal government is not a "labor organization." The other sections cited by amicus AFGE (Br. 13) would be inapplicable for the same reason.

Moreover, even if it is assumed that Congress was principally concerned with the possible application of certain substantive provisions contained elsewhere in the Act, it hardly follows that the operation of Section 15(f) is so limited. Its language is expansive, as is its legislative history, despite the specific references in the House

Report to the two substantive sections relied upon by respondent and amici. That same House Report, for example, states that Section 15 "is complete in itself" (H.R. Rep. No. 95-527 (Pt. I), *supra*, at 11). And the Conference Report on Subsection (f) states that the provision "makes it clear that Section 15 of the act relating to federal employment is independent of any other section of the act, except section 12(b) which contains the age limitation for federal employees" (H.R. Conf. Rep. No. 95-950, *supra*, at 11).[7]

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[7] Amici Members of Congress suggest (Br. 24-25) that to read Section 15 not to incorporate procedures utilized in private sector cases under Section 7 would lead to "illogical" results. They argue, for example, that this would mean that the attorney's fees that may be awarded to an employee who sues under 29 U.S.C. 216(b)—and, hence, to an employee who brings an ADEA claim against a private employer—would not be available to a person who sues the federal government under Section 15 of the ADEA. However, in 28 U.S.C. 2412(b), as added by Section 204(a) of the Equal Access to Justice Act, Pub. L. No. 96-481, Title II, 94 Stat. 2328, Congress now has provided for the award of attorney's fees in an action against the United States or an agency or officer thereof to the same extent that any other party would be liable under the terms of any statute that specifically provides for such an award. Because attorney's fees may be awarded against private employers under the ADEA, they may be awarded in actions against the federal government as well. See also 5 U.S.C. 504, as added by Section 203(a)(1) of the Equal Access to Justice Act, Pub. L. No. 96-481, Title II, 94 Stat. 2325.

Another consequence of Congress' failure to incorporate FLSA procedures into federal sector ADEA cases is that employees are not restricted in bringing class actions under Fed. R. Civ. P. 23 by the requirement in 29 U.S.C. 216(b) that no employee be a party to a suit under that section unless he affirmatively "opts in" to the suit. But this result works to the advantage, not disadvantage, of federal employees, and it is consistent with Congress' decision to pattern federal sector ADEA cases after Title VII cases, where class actions are available. Congress' failure to apply FLSA procedures also bars the award of liquidated damages, which are available in suits under 29 U.S.C. 216 and Section 7(b) of the ADEA. But it is not surprising that Congress would decline to provide for the award of liquidated damages against the government, cf. 28 U.S.C.

5. Despite the compelling contrary indications in the language and legislative history of Section 15 of the ADEA, respondent argues (Br. 41-49) that the right to a jury trial has been affirmatively granted by Congress because Congress authorized the award of "legal or equitable relief" in suits brought under Section 15(c) and provided for such suits to be brought in federal district court rather than in the Court of Claims. These contentions are answered in our opening brief (Govt. Br. 29-41). We make only one further observation here.

As the Court observed in *Lorillard* (434 U.S. at 581), prior to enactment of the ADEA in 1967, the courts had held that injunctive relief is available under the FLSA only in an action brought by the Secretary of Labor, not in suits brought by individual employees. Congress "made plain its decision to follow a different course in the ADEA" (*ibid.*) by providing in Section 7(b) of the

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2674, and its failure to do so is consistent with the decision to pattern Section 15 of the ADEA after Title VII.

Respondent is correct (Br. 60-61) in asserting that the government has not always taken a consistent position on the meaning of Section 15(f) and the incorporation of FLSA procedures generally into Section 15 of the ADEA. To some extent, this has occurred because of an absence of coordination and a full study of the legal issues in the various districts. In *Moysey* v. *Andrus*, 481 F. Supp. 850 (D. D.C. 1979), for example, the government opposed class certification in a federal sector ADEA case by arguing, *inter alia*, that the "opt in" features under the FLSA, 29 U.S.C. 216(b), should be followed. The district court rejected that contention. In other cases, however, the government has invoked Section 15(f) to oppose the award of attorney's fees that would otherwise be available under 29 U.S.C. 216(b) (see, *e.g.*, *De Fries* v. *Haarhues*, 488 F. Supp. 1037, 1044-1045 (C.D. Ill. 1980)), and to oppose jury trials (see *Harris* v. *U.S. Department of Treasury*, 489 F. Supp. 476 (N.D. Ill. 1980)). This is the first case involving these issues to reach an appellate level; after a careful review of the legal issues, the Department of Justice has now arrived at a consistent litigating position. Cf. *Barrett* v. *United States*, 423 U.S. 212, 222 (1976).

ADEA that equitable relief is available "[i]n *any* action brought to enforce * * *" the Act (emphasis added), including those brought by private parties. Because Congress obviously deemed such relief to be an essential element of a private cause of action under the ADEA, it was sensible for Congress to limit jurisdiction of ADEA suits against the federal government to the district courts, which are accustomed to granting the type of broad equitable relief that is often necessary in employment discrimination cases, and thereby to foreclose jurisdiction in the Court of Claims, which does not have independent jurisdiction to grant equitable relief. *United States* v. *Testan*, 424 U.S. 392, 404-405 (1976). It would be ironic indeed if the jurisdictional limitation in Section 15(c), which has the effect of preserving for the district courts their traditional power to grant *equitable* relief in employment discrimination cases, were held to imply the affirmative grant of a right to trial by jury, which ordinarily applies, if at all, only in suits at law.

Thus, the authorization in Section 15(c) for the award of equitable relief alone distinguishes the dicta in *United States* v. *Pfitsch*, 256 U.S. 547 (1921),[8] upon which respondent primarily relies (Br. 41-42), in arguing that a grant to the federal district courts of exclusive jurisdiction over actions against the federal government implies a right to trial by jury. See also Resp. Br. 3, 21, 28, 34, 48-49. In *Pfitsch*, Section 10 of the Lever Act (ch. 53, 40 Stat. 279), authorized only suits at law to recover a money judgment in the amount of compensation alleged to be due for property requisitioned by the President. Moreover, in *Pfitsch*, as we have noted (Govt. Br. 32-34), Congress had considered and rejected a proposal for such claims to be

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[8] In *Pfitsch*, the parties agreed to trial by the court sitting without a jury (256 U.S. at 549), and the jury trial issue therefore was not directly before the Court.

brought under the Tucker Act (and, hence, without a jury trial), and the Court could conceive of no rational ground for rejecting that proposal except to confer a right to trial by jury. In the present case, in contrast, there is no indication that Congress gave any thought whatever to conferring jurisdiction on the Court of Claims under the Tucker Act, or that Congress focused on the jury trial issue in federal sector cases.[9]

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[9] *Law* v. *United States*, 266 U.S. 494 (1925), the other case upon which respondent principally relies (Resp. Br. 3, 17, 25, 34), likewise involved an action at law for money compensation—in that case a suit on a contract of insurance issued under the War Risk Insurance Act of 1917, ch. 105, 40 Stat. 398. Moreover, as we explained in our opening brief (Govt. Br. 35 n.28), the statement in *Law* regarding the availability of jury trials (which merely cites *Pfitsch*, adding nothing to the analysis) is dictum. In any event, *Law* is of no continuing importance on the issue of jury trials under the War Risk Insurance Act. After the district court decision in *Law* (290 F. 972 (D. Mont. 1923)), but prior to this Court's decision in the case, Congress amended the Act to provide that procedures in suits under the Act should be the same as those in cases under the Tucker Act. See World War Veteran's Act, 1924, ch. 320, Section 19, 43 Stat. 612-613. This had the effect of barring jury trials. Just two months after this Court's decision in *Law*, Congress amended the Act (see World War Veteran's Act Amendments, ch. 553, Section 2, 43 Stat. 1302-1303) for the express purpose of "giv-[ing] claimants the right to a jury trial" (H.R. Rep. No. 1518, 68th Cong., 2d Sess. 2 (1925). See generally *Galloway* v. *United States*, 319 U.S. 372, 389 n.18 (1943). The later cases arising under the War Risk Insurance Act cited by respondent (Br. 25-28) all relied on the post-*Law* amendment for the conclusion that jury trials are available. See *Galloway* v. *United States*, *supra*; *Hacker* v. *United States*, 16 F.2d 702, 704 (5th Cir. 1927); *Whitney* v. *United States*, 8 F.2d 476, 478 (9th Cir. 1925); *Prouty* v. *United States*, 94 F. Supp. 320, 321 (D.N.H. 1950). Thus, contrary to respondent's assertion (Br. 25-28, 43-44), these cases are not examples of the recognition of a right to trial by jury against the government where Congress has been silent on the question.

The court in *United States* v. *Thomas*, 53 F.2d 192, 195 (4th Cir. 1931) (Resp. Br. 25), merely observed that the case was tried to a jury, without discussing the legal issue involved here. In *Holliday* v. *United States*, 87 F. Supp. 367, 368 (Ct. Cl. 1949), also cited

6. Finally, respondent argues (25-34) that a right to trial by jury may be inferred from Congress' silence regarding the procedure to be followed in ADEA cases against the federal government. However, with respect to the jury trial issue, Congress has not been silent. It has provided for jury trials in suits against private employers and state and local governments under Section 7(c) of the Act, but has not so provided in suits against the federal government under Section 15(c). This omission must be regarded as deliberate. In any event, the cases upon which respondent relies do not support her argument that silence alone confers the right she would invoke.

Two of the eight categories of cases discussed by respondent involve suits against federal officers in their private, not official capacities, and therefore have no relevance to the question of jury trials against the federal government.[10] A third category includes cases holding that there is *no* right to a jury trial in cases brought in Tax Court. *Bagur* v. *Commissioner*, 603 F.2d 491, 500 (5th Cir. 1979); *Dorl* v. *Commissioner*, 507 F.2d 406 (2d Cir. 1974). These cases, to the extent they are relevant, cut against respondent's position.

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by respondent (Br. 27), the question of jury trials was not even discussed. *United States* v. *McGovern*, 299 F. 302 (9th Cir. 1924), was decided before this Court's decision in *Law*. As in *Law*, the *McGovern* court stated that jury trials were available under the War Risk Insurance Act, citing *Pfitsch* without further analysis. And as in *Law* and *Pfitsch*, the reference to jury trials was dictum, because the trial had been held without a jury and the judgment was affirmed.

[10] See Br. 18-21, 29, citing, *inter alia*, *Wickwire* v. *Reinecke*, 275 U.S. 101, 105-106 (1927); Br. 32, citing *Carlson* v. *Green*, 446 U.S. 14, 22 (1980). *Wickwire* and other tax refund cases are discussed in our opening brief (Govt. Br. 13-14 n.6). The Court's observation in *Carlson* v. *Green* that the plaintiff in a *Bivens* action against a federal official would have a right to trial by jury apparently referred to the Seventh Amendment guarantee and therefore has no application here.

Three of the other "categories" of cases discussed by respondent each consist of one decision in which a court of appeals has recognized a right to trial by jury under the unique wording of the particular legislation involved; they therefore have no application to the present case. Two of the cases, in fact, were not even against the United States.

Of these cases, respondent places particular reliance (Br. 8, 16, 23-24, 30-32, 44, 49) on *Collins* v. *Government of the Virgin Islands*, 366 F.2d 279 (3d Cir. 1966), cert. denied, 386 U.S. 958 (1967), which involved a tort suit against the Virgin Islands arising out of a traffic accident. Congress had authorized the Virgin Islands to consent to suit (336 F.2d at 382, citing 48 U.S.C. 1541 (b)), and the legislature had done so by passing a private bill allowing the plaintiff to "'*proceed against the Government as in the case of any other defendant, subject to the same procedures and defenses*'" (366 F.2d at 283, quoting Act No. 921; emphasis in original). Because the Virgin Islands expressly elected to be treated as any other tort defendant, and because jury trials ordinarily are available in tort suits between private parties, the Third Circuit concluded that a jury trial was available under the particular statute. Thus, contrary to respondent's contention, *Collins* was not a case in which the legislature was silent regarding the mode of trial. There is no comparable language in the ADEA providing that the federal government may be sued "subject to the same procedures" as any other defendant.

Monolith Portland Midwest Co. v. *Reconstruction Finance Corp.*, 240 F.2d 444 (9th Cir. 1957) (see Resp. Br. 29-30), likewise did not involve a suit against the United States. There, the court held that the plaintiff in a suit under the Contracts Settlement Act of 1944 against the Reconstruction Finance Corporation was entitled to trial by jury. But in that Act, Congress had provided for alternative methods of recovery: the contractor could bring

a suit against the United States under the Tucker Act, in which a jury trial would be barred, or (if the contracting agency was the RFC) an action could be brought "in any court of competent jurisdiction *in accordance with existing law*" (240 F.2d at 446, quoting 41 U.S.C. 113(b)(2); emphasis added). The court concluded that since Congress had separately authorized suits against the RFC " 'in accordance with existing law' " and had mentioned the RFC in an *excepting* clause to a general provision for non-jury suits against the United States under the Tucker Act, Congress intended that the suits be tried to a jury. 240 F.2d at 449. Once again, Congress cannot be thought to have been wholly silent regarding the manner of suit. The court also noted (*id.* at 447) that Congress had permitted the corporation to sue and be sued and that the corporation's activities were outside the ordinary range of the government's sovereign immunity. *Id.* at 446-447, quoting *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381 (1939). These factors do not apply in the present case.

The last of the three appellate cases cited by respondent (Br. 33-34) is *Franquez* v. *United States*, 604 F.2d 1239 (9th Cir. 1979). That case involved suits by landowners in Guam under Section 204 of the Omnibus Territories Act for just compensation from the United States for land acquired at the end of World War II and in succeeding years. The court analogized actions under Section 204 to cases in which the government exercises its power of eminent domain. In such cases, the district court has discretionary authority under Fed. R. Civ. P. 71A(h) to order a jury trial. After noting the district court's observation that, by fair implication, Congress intended that persons suing under Section 204 should have the same rights as those who had contested the issue of fair compensation in condemnation proceedings, the court held that it was similarly within the discretion of the district court to grant a jury trial in suits under that section. The court did *not* hold that the plaintiff had an

absolute right to trial by jury, as respondent argues here.

Aside from the six "categories" of cases just discussed, respondent relies only on *Pfitsch* and cases arising under the War Risk Insurance Act for her argument that a right to trial by jury may be inferred from congressional silence. But, as we have noted (see pages 13-14, *supra*), the Court in *Pfitsch* found that Congress had specifically focused on the jury trial issue. The cases arising under the War Risk Insurance Act, most of which relied on an amendment expressly intended by Congress to confer a right to jury trial, do not support respondent's position for the reasons stated above (see note 9, *supra*). Accordingly, respondent is wrong in asserting that a right to trial by jury in suits against the federal government may be inferred from mere silence—even if the ADEA could be said to be silent on this issue.[11]

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[11] Respondent seems to suggest (Br. 23-24) that the existence of certain express prohibitions against jury trials in suits against the United States, such as that in 28 U.S.C. 2402, indicates that jury trials are available in suits against the federal government in the absence of such a prohibition. This contention is in error. The bar to trial by jury in 28 U.S.C. 2402 derives from Section 2 of the Tucker Act, ch. 359, 24 Stat. 505, which granted the district and circuit courts concurrent jurisdiction of claims where the amount in controversy was less than $1000 and $10,000, respectively. As first passed by the House, the bill eventually enacted as the Tucker Act (H.R. 6974, 49th Cong., 1st & 2d Sess. (1886 & 1887)) expressly provided, in Section 6, that suits at law brought in the district and circuit courts under Section 2 of the act would be tried to a jury unless the parties waived a jury trial. 18 Cong. Rec. 623 (1887). The Senate, however, deleted the authorization of jury trials in Section 6 of the bill and added a second sentence to Section 2 providing that "[a]ll causes brought and tried under the provisions of this act shall be tried by the court *without* a jury" (18 Cong. Rec. 2175 (1887); emphasis added). The House agreed to the Senate amendment (18 Cong. Rec. 2677 (1887)), and Section 2 was enacted in this form. Thus, the express prohibition against jury trial in cases under the Tucker Act, now contained in 28 U.S.C. 2402, merely reflects the manner in which Congress resolved the conflict between

CONCLUSION

For the foregoing reasons, and for the additional reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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the House's express *grant* of a right to trial by jury and the Senate bill's express *prohibition* of jury trials. It does not suggest that jury trials are available when Congress has not specifically addressed the question.

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